

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

Beef Products, Inc., BPI Technology,	)	
Inc. and Freezing Machines, Inc.,	)	Civ. No. 12-4183
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
American Broadcasting Companies,	)	
Inc., ABC News, Inc., Diane Sawyer,	)	
Jim Avila, David Kerley, Gerald	)	
Zirnstien, Carl Custer and Kit	)	Judge Lawrence L. Piersol
Foshee,	)	
	)	
Defendants.	)	

**DEFENDANT KIT FOSHEE'S MOTION TO DISMISS**

Now comes Defendant Kit Foshee, by and through his attorneys, Loevy & Loevy,<sup>1</sup> and Cadwell Sanford Deibert & Garry LLP, and hereby respectfully moves pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing Plaintiffs' Complaint with prejudice on the following grounds:

1. The Complaint fails to state any claims upon which relief may granted. The statements alleged to be defamatory and disparaging do not bear the meanings ascribed to them, are substantially true, or are not assertions of verifiable objective fact.

2. Moreover, the common law product disparagement counts must be dismissed because the South Dakota Agricultural Food Products Act ("AFPDA") preempts any common law claims for product disparagement.

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<sup>1</sup> Pro hac vice motions of Daniel Twetten and Elizabeth Wang are pending.

3. Because none of the challenged statements assert or imply that lean finely textured beef (“LFTB”) is not safe for public consumption, the Complaint does not state a claim under the AFPDA.

4 Finally, BPI Technology and Freezing Machines, Inc.’s claims must be dismissed for the additional reason that they are not real parties in interest and were fraudulently joined in an attempt to defeat this Court’s jurisdiction.

5. The foregoing are questions of law that may be decided by this Court under Fed. R. Civ. P. 12(b)(6).

6. In support of this Motion, Defendant Kit Foshee refers this Court to all files and proceedings herein, including the accompanying Memorandum in Support of Defendant Foshee’s Motion to Dismiss.

Dated: October 31, 2012

Respectfully submitted,

/s/ SW Sanford

One of Defendant Kit Foshee’s Attorneys

Daniel Twetten\*  
Elizabeth Wang\*  
LOEVY & LOEVY  
312 N. May St., Suite 100  
Chicago, IL 60607  
(312) 243-5900  
dan@loevy.com  
elizabethw@loevy.com  
\*Pro hac vice motions pending

Steven W. Sanford  
Alex Hagen  
CADWELL SANFORD DEIBERT  
& GARRY LLP  
200 W. 10th St., Suite 200  
Sioux Falls, SD 57101  
(605) 336-6036  
ssanford@cadlaw.com  
ahagen@cadlaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following counsel:

Mr. Daniel L. Hartnett  
Ms. Sabrina L. LaFleur Saylor  
Crary Huff Ringgenberg Hartnett & Storm, P.C.  
711 Sioux Point Road, Suite 200  
Dakota Dunes, SD 57049  
E-mail: [dhartnett@craryhuff.com](mailto:dhartnett@craryhuff.com) and [ssaylor@craryhuff.com](mailto:ssaylor@craryhuff.com)  
***Attorneys for Plaintiffs***

Mr. Vince M. Roche  
Mr. Edwin E. Evans  
Ms. Elizabeth S. Hertz  
Davenport, Evans, Hurwitz & Smith, LLP  
206 West 14<sup>th</sup> Street, PO Box 1030  
Sioux Falls, SD 57101-1030  
E-mail: [vroche@dehs.com](mailto:vroche@dehs.com), [eevans@dehs.com](mailto:eevans@dehs.com) and [ehertz@dehs.com](mailto:ehertz@dehs.com)  
***Attorneys for Defendants Gerald Zirnstein and Carl Custer***

Mr. Scott N. Heidepriem  
Mr. Ronald A. Parsons, Jr.  
Ms. Shannon Falon  
Johnson, Heidepriem & Abdallah, LLP  
PO Box 2348  
101 S. Main Avenue, Suite 100  
Sioux Falls, SD 57104  
E-mail: [scott@jhalawfirm.com](mailto:scott@jhalawfirm.com), [ron@jhalawfirm.com](mailto:ron@jhalawfirm.com) and [shannon@jhalawfirm.com](mailto:shannon@jhalawfirm.com)  
***Attorneys for Defendants American Broadcasting Companies, Inc., ABC News, Inc., Diane Sawyer, Jim Avila, and David Kerley***

Dated: October 31, 2012

/s/ SW Sanford

One of Defendant Foshee's Attorneys